Supreme Court, U.S.
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In The
Supreme Court of the United States

LEONARD PELTIER
And
YORIE VON KAHL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Mandamus To The United States District Court For The District Of Kansas

PETITION FOR WRIT OF MANDAMUS

CARL NADLER, ESQUIRE
HELLER, EHRMAN, WHITE & MCAULIFFE
1666 K Street, Suite 300
Washington, DC 20006
(202) 912-2575

Of Counsel:
BARRY A. BACHRACH
BOWDITCH & DEWEY, LLP
311 Main Street, P.O. Box 15156
Worcester, MA 01615-0156
(508) 926-3403

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the United States District Court for the District of Columbia erroneously ordered the transfer of the instant case to the United States District Court of Kansas on the ground that it is a writ of habeas corpus when in fact it is not a writ of habeas corpus in substance or relief sought.

LIST OF PARTIES

The name of all parties appear in the caption of the case. The Petitioners are not a corporation.

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CITATIONS OF OPINIONS AND ORDERS ENTERED BY LOWER COURTS

Leonard Peltier et al. v. United States Parole Commission et al., United States District Court for the District of Columbia, Civil Action No. 04-1529 (ESH), Memorandum Opinion and Order, dated October 15, 2004

In Re: Leonard Peltier and Yorie Von Kahl, United States Court of Appeals for the District of Columbia Circuit, No. 04-5391, Order dated December 30, 2004

BASIS OF JURISDICTION

This petition seeks a writ of mandamus ordering the United States District Court for the District of Columbia to exercise jurisdiction over this matter and render a decision on the merits. The District Court, as affirmed by the United States Court of Appeals for the District of Columbia, has erroneously ordered that this matter be transferred to the United States District Court for the District of Columbia. This petition is authorized and timely under 28 U.S.C. §1651(a) and Rule 20 of the rules of the United States Supreme Court.

STATUTORY PROVISION INVOLVED

This case involves The Sentencing Reform Act, Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3220. More specifically, it involves Section 235(b)(3) of that Act (Public Law 98-473, Title II, §235(b)(3)), Public Law 100-182, §2, and Public Law 100-182, §26.

STATEMENT OF THE CASE AND PERTINENT FACTS

The essence of Plaintiffs' complaint concerns a series of actions taken over the course of many years by various bureaucrats within various branches of the Parole Commission, the Department of Justice, and the Bureau of Prisons which has led to the unconstitutional application of an unambiguous federal statute, contrary to Congress' express mandate, and which has resulted in the illegal incarceration of numerous federal prisoners. Mr. Peltier and Mr. Kahl seek, among other things, monetary damages for past and present injuries for executive action committed in violation of Congress' express mandate and the United States Constitution. *See Chatman-Bey v. Thornburgh*, 864 F.2d 804, 810 n. 5 and 6, 816-17 (D.C. Cir. 1988) (habeas analysis "has no bearing on prisoner's claims for money damages" and the court's "analysis goes solely to situations where the federal prisoner is seeking non-monetary redress for alleged violations of federally secured rights going to the lawfulness of his or her custody.")[1] *See also Wilkinson v. Dotson*, 544 U.S. ___ (March 7, 2005) (held state prisoners may bring a §1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures; they need not seek relief exclusively under the federal habeas corpus

[1] *Chatman-Bey*, a case relied upon by the Court to transfer this case, actually supports Plaintiffs' contention that their case was properly before the District Court. In fact, the majority opinion expressly agreed with the concurring opinion on this point. 864 F.2d at 816-17, *quoting Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973), and *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974) (emphasizing that in damages cases habeas is "*not* appropriate or available" and injunctive relief is proper in such suits.)

statutes).[2] Moreover, courts have long recognized that federal prisoners can seek declaratory and/or injunctive relief to remedy unlawful and unconstitutional behavior by the Defendants' unconstitutional enforcement of statutes in circumstances such as these. *Geraghty v. United States Parole Commission*, 579 F.2d 238, 243 (3rd Cir. 1974); *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967), *aff'd*, 390 U.S. 713 (1968). *See also Howard v. Ashcroft*, 248 F. Supp. 2d 518 (M.D.La. 2003).

In 1984, Congress passed the Sentencing Reform Act ("SRA"), arguably the first comprehensive sentencing law reform for the federal system. (S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3220).[3] The Comprehensive Crime Control Act of 1984 (hereinafter "CCCA"), constituted several chapters within the SRA and represented the decade long efforts by Congress to create a sentencing structure that would eliminate disparity in sentencing, establish certainty as to release from confinement, and abolish the Parole Commission and parole. The Senate Report noted:

> At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of 'coercive' rehabilitation ... Recent studies suggest that this approach has failed. Most sentencing judges, as well as the Parole Commission, agree that the

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[2] While *Wilkinson* involves state prisoners under §1983, the rationale of the decision is even stronger with respect to federal prisoners, such as those involved in this case, bringing actions directly under the United States Constitution. In such cases, the prisoners should not be limited to habeas relief. *See Wilkinson*.

[3] Senate Report 98-225, 1984 U.S.C.C.A.N. 3182 will hereinafter be cited by the respective page number as "S. Rep. 98-225 at ___."

> rehabilitation model is not an appropriate basis for sentencing decisions.

(S. Rep. 98-225 at 3221, 3223.) The Senate Report continued:

> The efforts of the Parole Commission to alleviate this disparity unfortunately contributed to a second grave defect of present law: no one is ever certain how much time a particular offender will serve if he is sentenced to prison . . . Thus, prisoners often do not really know how long they will spend in prison until the very day they are released. The result is that the existing Federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime.

Id. at 3232-3233. The Senate Report concluded:

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear, that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.
>
> The bill, as reported, meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase-out parole release, and make criminal sentencing fairer and more certain.

Id. at 3248.

To address these issues, Congress enacted Section 235(b)(3), effective October 12, 1984, *Lyons v. Mendez*, 303 F.3d 285, 289 (3rd Cir. 2002),[4] which mandated that "the Parole Commission shall set a release date consistent with the applicable parole guideline" for those remaining in its custody "before the expiration of the five years," at which point the Commission would be dissolved. Congress retained the Commission for five years following the effective date of the Act solely "to set release dates for prisoners sentenced before that date" emphasizing that by "the end of that period, the Parole Commission would set final release dates for all prisoners still in its jurisdiction." Senate Report No. 98-225, 98th Congress, First Session, September 12, 1983, p. 56 n. 82.

In enacting Section 235(b)(3), Congress thereby recognized the inherent arbitrariness underlying parole decisions. As the United States Supreme Court recognized in *Mistretta v. United States*, 488 U.S. 361, 366 (1989):

> It is observed that the indeterminate-sentencing system had "unjustified" and "shameful" consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison.

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[4] According to the Commission's quarterly meeting minutes from November 14, 2002 (submitted December 26, 2002), the Commission stated: "[O]n October 12, 1984 Congress eliminated federal parole and set in place provisions at Section 235(b) of the Sentencing Reform Act for the transition from a sentencing/punishment system with parole eligibility to one in which the offenders would serve determinate sentences."

On December 7, 1987, over three years later, Congress amended Section 235(b)(3) to repeal the release criteria and to restore the criteria under 18 U.S.C. §4206, Public Law 100-182,§2. Because this amendment substantially changed existing law, Congress explicitly provided under the "General Effective Date" of the act at Section 26: **"The amendments made by this Act shall apply with respect to offenses committed *after* the enactment of this Act."** 101 Stat. 1272. (Emphasis added.)

Based on the original version of Section 235(b)(3) which became effective October 12, 1984, the Commission was abolished as of midnight on October 11, 1989,[5] and prisoners, such as the Plaintiffs, would have each possessed release dates and would have, in fact, been released long ago.

REASONS WHY THE WRIT OF MANDAMUS SHOULD ISSUE

A. THIS COURT HAS AUTHORITY TO ISSUE THE EXTRAORDINARY WRIT OF MANDAMUS IN THIS CASE.

This Court has authority to issue a writ of mandamus to reverse the lower courts' erroneous transfer order under the All Writs Act (28 U.S.C. §1651(a)). *Schlaegenhof v. Holder*, 379 U.S. 104, 11-12 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 254-55 (1957); *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943). "A traditional use of the writ in aid of appellate jurisdiction both

[5] *See Lyons*, 303 F.3d at 289; *Piekarski v. Bogan*, 912 F.2d 224, 225 (8th Cir. 1990).

at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352 (1975); *Roche*, 319 U.S. 21, 26 (1943); *Ex parte Peru*, 318 U.S. 578, 584 (1943). "Repeated decisions of this Court have established the rule . . . that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause, . . . or to require a Federal court of inferior jurisdiction to reinstate a case, and to proceed to try and adjudicate the same." *Thermtron*, 423 U.S. at 352. In particular, the writ of mandamus is available "to prevent abuses of a district court's authority to transfer a case." *In re Sealed Case*, 141 F.3d 337, 329 (D.C. Cir. 1998), *quoting, Ukiah Adventist Hospital v. Federal Trade Commission*, 981 F.2d 543, 549 (D.C. Cir. 1992), and *In re Chatman-Bey*, 718 F.2d 484, 486 (D.C. Cir. 1983). *See also In re Briscoe*, 976 F.2d 1425, 1427 (D.C. Cir. 1992). *See also In re Parker*, 131 U.S. 221, 226-227 (1889). Thus, as demonstrated below, exceptional circumstances exist which require this Court to exercise its authority to correct, by a writ of mandamus, the lower courts' clearly erroneous transfer of this case, and adequate relief cannot be obtained in any other form or from any other court.

B. CASE LAW ESTABLISHES THAT THIS CASE WAS PROPERLY BEFORE THE DISTRICT COURT.

Plaintiffs properly brought this case in the District Court. The Amended Complaint seeks damages, declaratory relief and injunctive relief concerning Defendants' unconstitutional application of Section 235(b)(3), contrary to Congress' express mandate. Defendants have ignored

Congress' mandate that Section 235(b)(3) applies to prisoners such as Mr. Peltier and Mr. Kahl and, in doing so, have violated the ex post facto, bill of attainder, and due process clauses of the United States Constitution. Plaintiffs brought this action directly under the United States Constitution to seek enforcement against Defendants' wrongful conduct which has spanned many years and involves the actions of numerous Commissioners, United States Attorney Generals, and Directors of the Bureau of Prisons. Put simply, it is an action brought directly under provisions of the United States Constitution which action seeks enforcement of Congress' express mandate and has wide ranging effect upon the rights of numerous federal prisoners.

Plaintiffs seek declaratory relief that Defendants have wrongfully applied Public Law 100-182, Section 2, enacted on December 7, 1987, and that the rights created by the original Section 235(b)(3) must be enforced, *nunc pro tunc*. They also specifically seek damages and injunctive relief prohibiting Defendants from applying the Public Law 100-182, Section 2, enacted on December 7, 1987. Through its equitable powers, this District Court should have enforced the rights created by the original Section 235(b)(3), *nunc pro tunc*.

Courts have made clear that habeas corpus is not the only remedial option available to the Plaintiffs in these circumstances. *See Geraghty*, 579 F.2d at 243; *Greenfield*, 277 F. Supp. 644. *Greenfield* and *Geraghty* are particularly instructive here.

In *Greenfield*, 277 F. Supp. 644, the Plaintiff sought an injunction against the enforcement of a sentence under a state statute claiming it was unconstitutional and also

filed a motion for bail. The Court approved this procedure, granted bail and ultimately ruled that the statute violated the ex post facto provisions of the United States Constitution. 277 F. Supp. at 644-45. As such the Court issued the requested injunctive relief. 277 F. Supp. at 646. This case was affirmed in its entirety by the United States Supreme Court. 390 U.S. 713 (1968). This is the very same procedure followed by the Plaintiffs herein. Since it has been approved by the United States Supreme Court, this case is properly before this Court.

Geraghty also compels the District Court to exercise jurisdiction over this matter. In *Geraghty*, a federal prisoner challenged the validity of parole guidelines utilized by the United States Parole Commission. Contrary to the lower court's ruling that habeas corpus was the only remedy available to the prisoner, the Third Circuit ruled that the action could properly be considered as one for declaratory judgment which was an appropriate remedy. *Geraghty*, 579 F.2d at 243. In doing so, the Court reasoned that the instant case did not raise issues of federal and state comity:

> The Courts face no barriers resulting from federal-state relations in adjudicating issues such as the ones before us, since the present controversy involves the application of a federal statute by federal authorities. And, unlike a habeas corpus action challenging state confinement, no exhaustion has been statutorily mandated. Indeed, in contrast to the situation in *Preiser*, [411 U.S. 475 (1973)] Congress expressly contemplated declaratory actions to challenge the provisions of the federal parole guidelines.

As in *Geraghty*, the instant action seeks a declaration that the Parole Commission and the remaining Defendants have illegally applied Section 235(b)(3) as originally enacted and as amended. The complaint seeks declaratory and injunctive relief against Defendants continuing to take illegal activities against numerous federal prisoners, such as Mr. Peltier and Mr. Kahl. As acknowledged by the *Geraghty* Court, this relief falls within the United States Supreme Court's holding in *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974).

The Plaintiffs ultimately seek monetary damages for which habeas corpus is not appropriate or available. Indeed, contrary to the District Court's order, Plaintiffs are entitled to bring their damage claims under one of the very cases relied upon by the Court. *Chatman-Bey*, 864 F.2d at 810 n. 5 and 6, 817-18. The *Chatman-Bey* Court stated that habeas analysis "has no bearing on prisoner's claims for money damages" and the court's "analysis goes solely to situations where the federal prisoner is seeking non-monetary redress for alleged violations of federally secured rights going to the lawfulness of his or her custody." 864 F.2d at 810 n. 5 and 6. *See also* approval of concurring opinion on this issue at 864 F.2d 817-18. For those reasons, this case should have proceeded in the District Court.

C. THIS COURT'S RECENT DECISIONS CLEARLY SUPPORT THAT THIS CASE WAS PROPERLY BEFORE THE DISTRICT COURT.

The District Court's reliance on *Burke v. Hawk-Sawyer*, 269 F.3d 1072 (D.C. Cir. 2001), was misplaced. Contrary to the Court's rationale in its Order, a "probalistic impact" on the duration of custody alone cannot

supplant a civil action and compel habeas review only, not even with respect to a Section 1983 claim brought by a *state* prisoner in federal court. *Fletcher v. District of Columbia*, 370 F.3d 1223, 1227 (D.C. Cir. 2004) (limiting holding of *Chatman-Bey* "to claims brought by federal prisoners.")

On March 7, 2005, this Court expanded upon the "trilogy" of *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); and *Edwards v. Balistock*, 520 U.S. 641 (1997), all established only very limited holdings regarding *state* prisoner claims under statutes enacted by Congress which stem exclusively from the post Civil War Civil Rights and Habeas Corpus Acts – all of which dealt with the role of federal courts overseeing state court matters. *See Wilkinson v. Dotson*, 544 U.S. at ___.

In *Wilkinson*, two state prisoners brought separate actions for declaratory and injunctive relief under 42 U.S.C. §1983, claiming that Ohio's parole procedures violate the Federal Constitution. The *Wilkinson* Court reasoned that Section 1983 remains available for procedural challenges where success would not necessarily spell immediate or speedier release for the prisoner. In this case, the prisoners sought relief that would render invalid the state procedures used to deny parole eligibility and parole suitability. Thus, this Court held that the state prisoners could bring a §1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures. *Wilkinson*, at slip op. at 3-10.

There is nothing inconsistent in the *Preiser* trilogy. As this Court noted in the *Preiser* trilogy, Section 1983 necessarily intersected with the habeas statute, and the Court had to reconcile Section 1983 actions with the requirement

that "federal habeas corpus requires that state prisoners first seek redress in a state forum." 512 U.S. at 480-81. *See also Nelson v. Campbell*, 541 U.S. ___, ___, 158 L.Ed. 2d 924, 932 (2004) (State prisoner claims under Section 1983 "must yield" to the habeas statute concerning review of state prisoner confinement.)

Neither the language, history nor purposes of the habeas statute confirm jurisdiction on this Court, (*cf.* 28 U.S.C. §1331), nor do they address the issues presented by the Supreme Court's "trilogy," which this Court suggests confine the Plaintiffs to a single (and in this case clearly inadequate) remedy. This is particularly true where, as here, the United States Constitution provides this Court with inherent jurisdiction to remedy violations such as those presented in this case. *See, e.g., Bivens v. Six Unknown Federal Agents*, 403 U.S. 388, 392, 396 (1971); *Marbury v. Madison*, 5 U.S. 137, 163-66 (1803) (citizen of United States who suffers "injury" has a "right to resort to the laws of his country for a remedy").

It is also significant that both the Civil Rights Act of 1871, now 42 U.S.C. §1983, and the Habeas Corpus Act of 1867, now 28 U.S.C. §2241 (C)4 and (D) and 28 U.S.C. §2254, were enacted in light of the Thirteenth, Fourteenth and Fifteenth Amendments and involved the potential clash of sovereignty retained by the Tenth Amendment. The history of those statutes and their purposes are so well known that repeating them here is not necessary. However, any construction of the Civil Rights Act of 1871 and its progeny and the federal-state comity issues arising from that Act formed the basis for the "trilogy" of decisions by the United States Supreme Court. *Preiser*, 411 U.S. at 491-93.

It is also critical that 42 U.S.C. §1983 "'creates a species of tort liability'" *Heck*, 512 U.S. at 483 (citing cases), whereas 28 U.S.C. §1331 grants subject matter jurisdiction in district courts for constitutional and federal claims. Plaintiffs' claims against Defendants arise predominantly under the express terms of federal statutes, the ex post facto, bill of attainder and due process clauses. Plaintiffs' right to seek redress for injuries suffered under those clauses arise directly under the fundamental charter of this Country itself. *Bivens, supra*; *Marbury, supra*. With respect to Plaintiffs' federal statutory claims, they rest on Defendants' failure to perform mandatory ministerial duties which Congress required of Defendants, and they are based on Defendants' failure to follow Congress' command to apply the amended statute to offenses committed after December 7, 1987. Defendants, however, arbitrarily applied the 1987 amendment to offenses committed before December 7, 1987 to the direct injury of Plaintiffs and, of course, in direct violation of the above noted constitutional provisions.

Even if the limited holdings of the Supreme Court "trilogy" could be expanded to restrict cases by federal prisoners and citizens arising directly under the Constitution, even though Congress has never expressly attempted to restrict theses rights, any attempt to do so would violate the Constitution. Indeed, Plaintiffs fall directly into the exception expressly emphasized repeatedly by the Supreme Court. *Heck*, 512 U.S. at 486-87, (*Heck* held that "the §1983 plaintiff must 'bring his action for damages whenever he shows that his conviction or sentence has been 'reversed', 'expunged', or even 'brought into question' by a proper authority").

By Public Law 98-473, Title II, Chapter II, effective October 12, 1984, Congress expressly required the Parole Commission to establish release dates for federal prisoners such as Plaintiff's "within" the respective "applicable guidelines," a simple ministerial task. Section 235(b)(3) mandated issuance of their release dates within five years of October 12, 1984, with sufficient time for federal prisoners to exhaust appeals. Section 235(b)(2)(b)(1)(F) repealed all parole statutes pertaining to the Commission, giving them a five year period to complete their ministerial duties. Sections 218(a)(3) and 235(a)(2)(b)(1)(A) repealed all statutory authority of the Executive Branch to "hold" plaintiffs. Furthermore, Congress expressly found the sentences under the pre-sentencing guideline system to be inherently "arbitrary and capricious." Senate Report, No. 98-225, page 65.

Congress' deliberate actions more than satisfied the "reverse," "expunged" and/or "brought into question" exceptions of the "trilogy." Arguably, Congress' declaration that the sentences were "arbitrary and capricious" rendered them null and void and declared that the continued deprivation of plaintiffs' liberty indisputably violated the Due Process clause. Consequently, the *Preiser, Heck,* and *Edwards* rulings permit the instant suit even if plaintiffs were state prisoners proceeding under 42 U.S.C. §1983. Yet, the District Court erroneously relied upon cases involving state prisoners to support its transfer of this case.

Unlike the state prisoner plaintiffs challenging state judgments in *Preiser*, Plaintiffs are not challenging any judgments by these proceedings. They seek damages for defendants' refusal to perform their ministerial duties under the original Section 235(b)(3). Put simply, Plaintiffs

challenge the Defendants' unconstitutional procedures. Defendants have ignored that the amended Section 235(b)(3) applied to offenses committed after December 7, 1987 and instead have applied it to plaintiffs in violation of the ex post facto, bill of attainder and due process prohibitions, thereby causing plaintiff's severe injury.

Plaintiffs seek damages and request this Court to require the District Court to exercise its inherent power to enforce the federal statutes and constitutional prohibitions to prevent further injury to Plaintiffs and the numerous other prisoners in their position. Congress granted the District Court full jurisdiction to address Defendants' wrongs and to remedy them. 28 U.S.C. §1331; 28 U.S.C. §1657; 28 U.S.C. §§2201-2202; 28 U.S.C. §1651. *See United States v. Will*, 449 U.S. 200, 215 n. 19 (1980) ("'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'") "But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides a guarantee to citizens to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Bivens*, 403 U.S. at 396, *quoting, Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted.) Any constitutional "limitation" of "federal power . . . to citizens of the United States the *absolute right*" to judicial enforcement, federal "'courts will . . . adjust the remedies so as to grant the necessary relief.'" 403 U.S. at 392, 396 ("federal courts may use any available remedy to make good the wrong done.") Since the District Court had full jurisdiction granted it by Congress to proceed, 28 U.S.C. §§1331, 1657, 2201-2202, 1651, it should have done so and not have transferred the case.

CONCLUSION

Plaintiffs seek a writ of mandamus to prevent the District Court from transferring a case properly before it. Plaintiffs are not limited to habeas as their sole remedy in the circumstances presented, and, even more significantly, the instant case does not sound in habeas corpus. The unlawful and continued ignorance by the Defendants regarding the unambiguous statutes has violated not only the constitutional rights of these Plaintiffs, but numerous federal prisoners in their same situation, and thus has entitled the Plaintiffs to pursue the present action in the District Court. Thus, Plaintiffs request this Court to issue a writ of mandamus reversing the District Court's transfer of this case and requiring it to proceed forthwith in the District Court. This case presents exceptional circumstances warranting the exercise of this Court's powers, and adequate relief cannot be obtained in any other form or from any other court.

Respectfully submitted,

Leonard Peltier and Yorie Von Kahl,
By Their Attorneys,

CARL NADLER, ESQUIRE
HELLER, EHRMAN, WHITE & MCAULIFFE
1666 K Street, Suite 300
Washington, DC 20006
(202) 912-2575

Of counsel:

BARRY A. BACHRACH
BOWDITCH & DEWEY, LLP
311 Main Street, P.O. Box 15156
Worcester, MA 01615-0156
(508) 926-3403

March 28, 2005

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5391 **September Term, 2004**

04cv01529

Filed On:

(Dec. 30, 2004)

In re: Leonard Peltier and Yorie Von Kahl,
Petitioners

BEFORE: Sentelle, Rogers, and Roberts, Circuit Judges

ORDER

Upon consideration of the petition for writ of mandamus, it is

ORDERED that the petition be denied. Habeas is the exclusive remedy available to federal prisoners whose claims would have at least a "probabilistic impact" upon the duration of their custody. *See Bourke v. Hawk-Sawyer*, 269 F.3d 1072, 1074 (D.C. Cir. 2001); *Razzoli v. Federal Bureau of Prisons*, 230 F.3d 371, 373 (D.C. Cir. 2000). The district court did not abuse its discretion in granting the motion to transfer the case. *See In re: Tripati*, 836 F.2d 1406, 1407 (D.C. Cir. 1988). Because a habeas action must be brought in the federal court where the individual is incarcerated, transfer to the United States District Court for the District of Kansas was proper. *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2722 (2004); *Chatman-Bey v. Thornburgh*, 864 F. 2d 804, 810-11 (D.C. Cir. 1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

A True copy:

United States Court of Appeals
for the District of Columbia Circuit

By /s/ Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD PELTIER, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 04-1529 (ESH)**
UNITED STATES PAROLE COMMISSION, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

By amended complaint filed on October 12, 2004, plaintiffs have sued the United States Parole Commission, former and present Parole Commissioners, former and present United States Attorney Generals, the United States Bureau of Prisons, and former and present Directors of the Bureau of Prisons. Plaintiffs are inmates at the United States Penitentiary in Leavenworth, Kansas, having been, convicted of killing federal law enforcement agents. Pursuant to a show cause order issued by this Court, plaintiffs have filed a response arguing that this is not an action for habeas corpus, since they seek monetary damages, as well as declaratory and/or injunctive relief based on defendants' alleged unlawful application of the 1987 amendment to the Comprehensive Crime Control Act of 1984, § 235(b)(3). As explained below, plaintiffs misapprehend the law relating to habeas corpus and cannot vest jurisdiction in this Court by recasting their complaint as one for damages or declaratory and injunctive relief.

The law in this Circuit is clear. Where a federal prisoner brings a claim that would have a "probabilistic

impact" upon the duration of his custody, habeas corpus is the exclusive remedy. *See Bourke v. Hawk-Sawyer,* 269 F.3d 1072, 1074 (D.C. Cir. 2001), citing *Razzoli v. Federal Bureau of Prisons,* 230 F.3d 371, 373 (D.C. Cir. 2000). As was the case in *Bourke,* the crux of plaintiffs' claim is that they are being held unlawfully because a parole release date should have been set and even if they may not necessarily have succeeded in being released, their claim "would raise that possibility and thus have a 'probabilistic impact' upon the duration of his custody." *Bourke,* 269 F.2d at 1074.

Given the fact that plaintiffs' claim relates to the issue of parole eligibility, as was the case in *Razzoli,* habeas corpus is the exclusive remedy.[1] *See Muhammad v. Close,* 124 S. Ct. 1303, 1304 (2004) (*per curiam*) ("challenges to the validity of any confinement or to the particulars affecting its duration are the province of habeas corpus"). *Accord Preiser v. Rodriquez,* 411 U.S. 475, 489-903 (1973). Nor can plaintiffs evade this exclusivity rule by invoking § 1983 and arguing that this is a claim for money damages and thus covered by the footnote in *Chatman-Bey v. Thornburgh,* 864 F.2d 804; 810 n.6 (D.C. Cir. 1988).[2] Even if this case is construed as an action for § 1983 damages against defendants in their official capacities or for

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[1] Significantly, other cases involving the Parole Commission's application of § 235(6)(3) have been brought as habeas corpus petitions. *See, e.g., Lyons v. Mendez,* 303 F.3d 285 (3d Cir. 2002); *Piekarski v. Bogan,* 912 F.2d 224 (8th Cir. 1990). And in fact, plaintiffs have also filed habeas corpus petitions to challenge their confinement. Plaintiffs' Response to Court's Order to Show Cause at 2, n.2.

[2] Nor may plaintiffs rely on *Fletcher v. District of Columbia,* 370 F.3d 1223 (D.C. Cir. 2004). That case was not governed by *Razzoli,* since it involved a state prisoner. *Id.* at 1226-27. Here, plaintiffs are federal prisoners.

damages against defendants in their individual capacities under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), it is well settled that a prisoner may not seek damages for allegedly unconstitutional imprisonment unless "the conviction or sentence has been reversed on direct appeal, expunged by Executive Order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994). *See also Williams v. Hill,* 74 F.3d 1339, 1340 (D.C. Cir. 1996). Since plaintiffs have failed to prove that their conviction or sentences have been overturned, they cannot avoid the need to proceed by way of habeas corpus.[3]

Accordingly, since the proper respondent in habeas corpus cases is plaintiffs' warden, who is located in Kansas, *see Rumsfeld v. Padilla,* 124 S. Ct. 2711 (2004), *Stokes v. U.S. Parole Comm'n,* 374 F.3d 1255 (D.C. Cir. 2004), the Court orders the Clerk of Court to transfer this matter to the United States District Court for the District of Kansas.

s/
ELLEN SEGAL HUVELLE
United States District Judge

Dated: October 15, 2004

[3] Nor may plaintiffs rely on *Wolff v. McDonald,* 418 U.S. 539, 554-55 (1974), to argue that their claims for injunctive and declaratory relief are properly before this Court. *Wolff* excepted declaratory judgment from the *Preiser* rule only as a predicate to a damages award based on the "conditions of confinement rather than the fact or length of custody." *Id.* at 554. Here, plaintiffs are challenging the length of custody, not their conditions of confinement.